WP(C) 811/2007
BEFORE
HON'BLE JUSTICE B.K. SHARMA

JUDGEMENT AND ORDER

1. The matter relates to appointment transport contractor by the Food Corporation of India (FCI). According to the petitioner, the contract awarded to the respondent No. 5 is illegal being contrary to law.

2. On 04.10.06 the respondent Corporation issued tender notice inviting tenders for appointment of transport contractors. However, same was scrapped on 03.02.07 and on the same date another tender notice was issued inviting tenders in two bids tendering system of technical and price bid from experienced and bonafide handling transport contractors. The tender notice was also published in the newspaper and the petitioner went to the Regional Office (Contract Section) of the respondent Corporation, Assam Region Guwahati on 12.02.07 to obtain tender form. The Regional Office of the Corporation declined to supply the tender form to the petitioner and it was intimated that the transport contractor has already been appointed on regular basis w.e.f. 12.02.07. According to the information furnished, the contract was awarded to the respondent No. 5. On demand, the petitioner was provided with a copy of the order dated 12.02.07 by which the respondent/Corporation appointed the respondent No. 5 as transport contractor Ex Tinsukia Railway Siding/ FCI, FSD Tinsukia to FCI, FSD Khansang incluing handling work at FCI, FSD Khansang on regular basis for two years.

3. On 13.02.07, the respondent Corporation published another notice in the newspaper notifying that the earlier tender notice dated 03.02.07 has been cancelled. It is the case of the petitioner that upon such cancellation of the NIT, the respondent Corporation is required to issue fresh NIT for the purpose of awarding the works. However, without issuing any fresh tender, the respondent/Corporation has appointed the respondent No. 5 for the said work which according to the petitioner is extremely arbitrary and by way of adopting the policy of pick and choose basis. It is the further case of the petitioner that the respondent No. 5 has been appointed as transport contractor without any tender process purely on the basis of the private negotiation initiated with him. According to the petitioner, the respondent No. 5 had never submitted any tender for the work.

4. It appears that pursuant to the award of the contract to the respondent No. 5, he has already deposited the security money by furnishing demand draft and has also entered into an agreement with the FCI. The respondent No. 5 has been appointed as transport contractor on regular basis for two years w.e.f. 01.03.07 and presently he is running the contract works.

5. It is the grievance of the petitioner that the respondent No. 5 could not have been awarded with the contract without any tender process purely on the basis of the private negotiation and such awarding of the contract to him is in total violation of Article 14 of the Constitution of India. It has been asserted that the respondent Corporation while dealing with public matters cannot act arbitrarily and the matter relating to awarding of contract must conform to the requirement of the transparency and fair play.

6. Both the official as well as the private respondents have filed their counter affidavit to which the petitioner has submitted his affidavit in reply. In the affidavit filed by the respondents, it has been stated that pursuant to first NIT issued on 04.10.06 three tenderers responded to the same by submitting their tenders. One of the tenderers is the respondent No. 5. In the said tender process the petitioner did not participate. The dully constituted committee evaluated the bids which were opened on 15.12.06. The rates offered by the tenderers a

re as follows:

a) M/s. Ram Avatar Trading 161% ASOR
b) M/s. Gohain Brothers 137% ASOR
c) M/s. Assam Arunachal Road Carriers, proprietor Ram Sakal Rai (Respondent No. 5) 108% ASOR

7. The rates quoted by the participating tenderers were analysed and upon a comparison made with the rate as quoted by the lowest tenderer with the rate being paid for the existing contract, the following positions emerged.

a) Quoted rate for transportation and handling per MT Rs. 434.00/-
(transporation/MT Rs. 421.20 + handling/MT 12.80)

b) Existing rate for transportation and handling per MT Rs. 399.37-
(transportation/MT Rs. 337.05 + handling/MT 62.32)

c) Market rate for transportation and handling per MT Rs. 420.00/-
(transportation/MT Rs. 360.00+handling/MT 60.00)

8. According to the respondents, the above mentioned rates upon a comparison with the prevalent rate as applicable for the existing contract, was found to be on the higher side with regard to the rates as quoted for transportation charges. Accordingly the General manager of the Corporation issued direction for holding negotiation with the respondent No. 5. Upon receipt of intimation for negotiation, the respondent No. 5 expressed its inability to reduce the rates and prayed for consideration of his quoted rate for the work.

9. On receipt of the response from the respondent No. 5, the matter was further processed and analyzed. Although the concerned department had recommended for acceptance of the rate quoted by the respondent No. 5, the competent authority directed for scrapping of the tender process as the rate quoted by the lowest tenderer was considered to be on the higher side. Thereafter as per the decision of the competent authority the matter was again processed for retendering which resulted in issuance of the aforementioned NIT dated 03.02.07 published in the newspaper on 06.02.07.

10. After publication of the tender notice, the respondent No. 5 by communication dated 08.02.07 placed on record his position with regard to the request for negotiation. The respondent No. 5 has also furnished reasons which prevented him from entering into any negotiation with the Corporation. A prayer was made for reconsideration of the matter and an offer was also made to lower the quoted rate from 108% ASOR to 105% ASOR.

11. On receipt of the said communication dated 08.02.07 from the respondent No. 5, the matter was again processed and it was unanimously decided by the officers that the reasons stated by the respondent No. 5 for inability to enter into negotiation with the corporation appeared to be genuine and the reduction affected in the quoted rate was beneficial to the Corporation. Accordingly, an approval being granted to the proposal for reconsideration of the decision to scrap the earlier tender process, the matter was further processed and a decision was arrived at for awarding the contract at the reduced rate of 105% ASOR and also to cancel the retendered NIT and the extension granted to the existing contractor. According to the respondents, the steps taken by the Corporation are in due exercise of the power vested on the competent authority and the decision was taken keeping in mind the interest of the Corporation. It has been stated that the decision to awarding the contact to the respondent No. 5 at the rate of 105% ASOR

has resulted in net saving of Rs. 1, 20,000/- (approximately) by the Corporation.

12. The respondent No. 5 has also reiterated the stand of the official respondents in the counter affidavit. Referring to the various parameters to qualify for awarding of contract, the respondent No. 5 has stated that he fulfilled all the requirements. As regards invitation for negotiation, it has been stated that he had apprised the competent authority about the difficulty in reduction in rate. It has further been stated that in the wake of mass killing of the labourers in Tinsukia District by the members of the extremist group, he had to rush to Tinsukia from Guwahati and there was no time for him to meet the Corporation officials. But it was his expectation that the representation submitted by him on 30.12.06 would receive due attention and that he would be invited for negotiation as per the relevant clause.

13. The respondent No. 5 has contended that the respondent Corporation without giving him an opportunity of negotiation, decided to scrap the NIT and reissued tender ignoring the fact that that the respondent No. 5 never refused to reduce the rate, but he had only prayed for considering his quoted rate. Having come to know about the scrapping of the earlier NIT, the respondent No. 5 submitted further representation before the respondent No. 3 apprising all the fact situation in which he had to rush to Tinsukia. In the letter, he also informed the respondent Corporation that he was ready to reduce his rate to 3% ASOR. The rest of the statements in the affidavit are relating to the process initiated by the respondent Corporation on receipt of his representation.

14. The respondent No. 5 in the affidavit has further contended that the writ petitioner is guilty of suppression of material fact as he has projected in the writ petition that the impugned decision of the respondent Corporation to award the contract to the respondent No. 5 is by way of private negotiation without any tender process. According to the respondent No. 5, the petitioner was aware of the developments leading to awarding of the contract to the respondent No. 5, but yet he suppressed those developments while projecting his Case invoking the writ jurisdiction. It has also been stated that the petitioner does not have any experience of executing any transport contract as the petitioner has not furnished any documentary proof whatsoever.

15. The petitioner in his affidavit in reply while reiterating the stand in the writ petition has also questioned the procedure adopted by the respondent Corporation towards awarding the contract to the respondent No. 5.

16. I have heard Mr. C. Baruah, learned Sr. counsel assisted by Mr. U.J. Saikia, learned counsel for the petitioner as well as Mr. U.K. Nair, learned S.C., representing the respondent Corporation. I have also heard Mr. S.K. Kejiwal, learned counsel representing the respondent No. 5 who has placed reliance on the decision of the Apex Court reported in (1972) 2 SCC 36 (State of Orissa vs. Harinarayan Jaiswal) and 2002 (2) GLT 422 (Deltech (India) Pvt. Ltd. Vs. ONGC) to buttress his argument. Learned counsel for the parties made their submission on the basis of the materials available on record and the facts taken note of as above.

17. The only question for determination is as to whether the respondent Corporation after deciding to scrap the earlier NIT dated 04.10.06 and issuing fresh NIT dated 03.02.07 could have again decided to withdraw the fresh NIT so as to act upon the NIT which was scrapped. It is not a case of awarding the contract to the respondent No. 5 through private negotiation without any tender process as has been contended by the petitioner. In the writ petition, the case projected by the petitioner is that when he had approached the authorities for supplying of tender documents, he was informed that the contract has already been awarded to the respondent No. 5 by the impugned order dated 12.02.07. There is no whispe

r in the writ petition regarding the developments which took place in between. According to the respondent No. 5, the petitioner was aware of the developments but only with a view to obtain interim order, suppressed those developments and projected the case to be one of awarding contract without tender process, throu gh private negotiation.

18. The facts are not in dispute. A decision was taken to scrap the earlier tender process and to issue fresh NIT and in fact, fresh NIT was also issued on 03.02.07 published in the newspaper on 06.02.07. After issuance of the fresh NIT , the aforementioned developments took place. It is on record that the responden t No. 5 on being invited for negotiation for reduction of the rate, requested th e authorities of the Corporation to consider the rate offered by him afresh. How ever, he never refused to negotiate with the authorities. In the meantime, he ha d to rush to Tinsukia at the wake of the mass killing of labourers by the member s of the extremist group. After meeting the situation there and having noticed t he fresh NIT, he made further representation to the respondent Corporation on th e issue relating to reduction of rate. On receipt of the representation, the mat ter was further processed and a decision was taken that the contract be warded t o the respondent No. 5. There is no denial that by such awarding of contract to the respondent No. 5, the respondent Corporation has saved public money.

19. The same very authority which had decided scrapping of tender process re viewed its own decision and upon such review, decided to revive the earlier tend er process and upon cancellation of the fresh tender notice, acted upon the earl ier tender process. It is not a case of awarding of contract to undeserving tend erer, but in fact, the contract has been awarded to the lowest tenderer who upon negotiation has further reduced the rate from 108% ASOR to 105% ASOR.

20. By a decision taken on review, the fresh NIT has been cancelled. No righ t as such has accrued to the petitioner in respect of the fresh NIT. It is not a case of submission of tenders by the intending tenderers and accruing any right to the successful tenderers. The fresh tender notice was cancelled at the thres hold. The petitioner did not submit his tender in response to the earlier NIT an d there is no question of submitting of any tender pursuant to the fresh NIT as the same was withdrawn before the tenderers responded to the same. Thus, it is n ot a case of creation of any right in favour of the any party pursuant to the fr esh NIT, far less any right accrued in favour of the petitioner.

21. From the materials on record, it appears that the contractual work is be ing run by the existing party upon extension. By awarding the contract to the re spondent No. 5, the respondent Corporation has saved public money as the rate of fered by him is far less than the existing rate. It is in this connection, submi ssion was made by the learned counsel for the respondent No. 5 that the writ pet ition has been filed to favour extension of the contract in favour of the exist ing contractor. However, in absence of any materials, no opinion is expressed in this regard.

22. In Harinarayan Jaiswal (supra) case, the Apex Court observed that infere nce drawn by the Govt. that there was a collusion among the bidders may be right or wrong, but that was not open to the judicial review so long as it is not pr oved that it was a make believe one. In that case, it was found that real opinio n formed by the Govt. was that the price fetched was not adequate. It was observ ed that the conclusion was taken on the basis of the Govt. acceptance and such c onclusion arrived at by the Govt. did not affect anyone’s right. It was further observed that by merely giving bids, the bidder did not acquire any vested righ t and that the citizens cannot have any fundamental rights to trade or carry on business in the properties or rights belonging the Govt., nor can there be any infringement of Article 14, if the Govt. tries to get the best available price for its valuable rights. It was pointed out that it should not be forgotten that the power to accept or reject the highest bid is given to the highest authority

in the State, i.e. the Govt. which is expected to safeguard the finance of the State. In the instant case, it is not the case of exercising the power of review by the competent authority for any collateral purpose.

23. In Deltech (India) Pvt. Ltd., (supra) this Court observed that the competent authority is empowered to amend the directions of the NIT and it cannot be said that any accrued right of the tenderer by such amendment was violated.

24. In the instant case also, the petitioner neither responded to the earlier tender process nor could respond to the fresh tender process as the same was withdrawn upon decision to award the contract to the respondent No. 5 in terms of the earlier tender process and the negotiation thereto. No accrued right of the petitioner having been infringed, I am of the considered opinion that the petitioner is precluded from making any challenge to the decision of the respondent Corporation to award the contract to the respondent No. 5. Nothing could be shown that the decision arrived at by the authorities of the Corporation is vitiated by malafide or colourable exercise of power. The decision arrived at cannot be said to be arbitrary and untenable. It is for the Corporation to decide how best its interest and for that matter, the public interest is served. It is on record that by awarding the contract to the respondent No. 5, the respondent Corporation has saved public money and thus, has served public interest. The price offered by the respondent No. 5 is lower than the existing price.

25. For the foregoing reasons and discussions, I am of the considered opinion that no case for interference in the decision of the respondent Corporation by exercising the power judicial review under Article 226 of the Constitution of India, has been made out by the petitioner. Consequently, the writ petition is liable to be dismissed, which I accordingly do.

26. Writ petition is dismissed leaving the parties to bear their own costs.

JUDGE
Kborah